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IN THE
SUPREME COURT OF THE UNITED STATES

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS

Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas Fourteenth District

BRIEF OF AMICUS CURIAE AGUDATH ISRAEL OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Amicus curiae Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization with constituents all across the United States, including Texas.[1] Our

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[1] Pursuant to Supreme Court Rule 37.3(a), we have obtained from all parties their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for the amicus certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the amicus, has made a monetary contribution to the preparation or submission of this brief.

interest in this case is based in part on the classical Jewish view of homosexual activity, which is stated quite clearly in Leviticus 18:21: "You shall not lie with a man as one lies with a woman, it is an abomination."[2]

Yet we are submitting this brief not because we advocate that the modern-day secular state should use its police power against persons who engage in homosexual sodomy, but because we are deeply concerned about the potential far-reaching consequences of a decision that states are constitutionally prohibited from doing so – especially if the foundation for such a decision is a de-valuation of the state's interest in laws that are premised on considerations of traditional morality. As discussed more fully in our arguments that follow, the possible ramifications of any such ruling extend far beyond the ongoing viability of the

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[2] Amicus curiae The Commission on Social Action of Reform Judaism cites the teaching of Genesis 1:27--that all human beings are created in the Divine image--to show that "we are all . . . deserving of equal treatment." Brief of the Alliance of Baptists, The American Friends Service Committee, The Commission on Social Action of Reform Judaism, et al., at 2a. This is presumably the theological justification for the Reform Jewish position of "supporting and affirming" the "personal relationships" of "gay and lesbian people", including support for recognition of same-sex marriage. Ibid. at 11, citing the 1997 resolution of the General Assembly of the (Reform) Union of American Hebrew Congregations that urged "support [for] secular efforts to promote legislation which would provide through civil marriage equal opportunity for gay men and lesbians." Unlike our Reform brethren, we believe that the Author of Genesis 1: 27, in Whose Image we are all indeed created, also wrote Leviticus 18:21; and that Leviticus 18:21 means exactly what it says.

rarely enforced anti-sodomy laws of Texas and a dwindling minority of other states, perhaps even leading to the jettisoning of many if not all morality-based laws. As representatives of a community that believes that adherence to a moral code of conduct is the very essence of man's role in the world, we view such prospects with considerable alarm.

Accordingly, while this case raises a number of other important issues as well, our focus as amicus curiae will be on the narrow, but fundamental, issue of the constitutionally proper role of public morality in the legislative process of making law.

ARGUMENT

I.

THE GOVERNMENTAL INTEREST IN LAWS THAT REFLECT AND PROMOTE STANDARDS OF MORALITY IS RATIONAL, SUBSTANTIAL, EVEN COMPELLING

Petitioners assert two constitutional bases for their challenge to the Texas anti-sodomy statute: equal protection and privacy. We note, at the outset, our agreement with the analysis of the court below on each of these points. With respect to equal protection, the statute draws no distinctions between the sexes; its proscriptions and punishments apply to men and women alike. Accordingly, equal protection scrutiny of the statute should be minimal, satisfied by no more than the finding of a legitimate governmental interest and a rational basis for the law. Similarly, with respect to the asserted right of privacy, so long as this Court adheres to its ruling in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), that there is no fundamental right to engage in homosexual sodomy, any legitimate rational basis for the law will shield it from constitutional attack.

Petitioners and their amici supporters contend, however, that the Texas law does not even meet the minimal scrutiny rational basis test, because the state has no legitimate interest in prohibiting homosexual sodomy. They further contend that, in any event, Texas should be required to show something more than a legitimate governmental interest and rational basis for its anti-

sodomy law – either because the law should be seen as a gender-based classification, in which case the state would have to satisfy the "intermediate scrutiny" standard of showing a substantial relation between the law and an important governmental interest; or because, contrary to the holding in *Bowers*, the Texas law does implicate a fundamental privacy right, in which case the statute should be held to the "strict scrutiny" standard of being narrowly drawn to meet a compelling governmental interest. Surely, petitioners contend, there is no conceivable state interest that meets these higher scrutiny standards.

These contentions fundamentally misconceive and undervalue the government interest in laws that reflect and promote broadly held conceptions of public morality. It has long been recognized that laws premised on a legislature's conceptions of public morality are entitled to substantial deference. *See, e.g.*, *Hoke v. United States*, 227 U.S. 308, 321 (1913) ("There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime"). As the Eleventh Circuit recently stated in *Williams* v. *Pryor*, 240 F.3d 944, 949 (11th Cir. 2001), a case involving a legislative ban against the sale of certain sexual devices, "The State's interest in public morality is a legitimate interest rationally served by the statute. The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."

That the Texas statute at issue here is a law based on the legislature's sense of public morality cannot seriously be questioned. The Court in *Bowers*, 478 U.S. at 1992-94, as well the court below, correctly trace the longstanding social consensus that the practice of homosexual sodomy is immoral. Indeed, it is because "the law… is constantly based on notions of morality" that the Court ruled in *Bowers*, 478 U.S. at 196, that "majority sentiments about the morality of homosexuality" furnish a sufficient basis to uphold anti-sodomy laws against due process attack.

As noted above – and for the reasons detailed in the decision below, and in *Bowers*, and in the briefs of Respondents and their other supporting amici – we take issue with the notion that Texas must justify its law through the showing of a state interest that is not merely "legitimate," but "substantial" or even "compelling". But even if the Court concludes otherwise, there is ample authority for the proposition that the state's interest in morality-related laws is more than merely "legitimate". For example, in *Barnes* v. *Glenn Theatre*, 501 U.S. 560, 569 (1991), the Court concluded that a "public indecency statute furthers a *substantial* government interest in protecting order and morality" [emphasis added], thereby shielding it from free speech attack. This led the Eleventh Circuit to note in *Williams* v. *Pryor*, *supra*, 240 F. 3d at 949 (n.3): "In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's

burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases."

Further, in at least one area of the law – the state's authority to regulate certain aspects of marriage – it has been recognized that the government's interest in preserving social morality is so great as to be "compelling." As a result, statutes that restrict the right of individuals to marry whom they please have consistently been upheld by the courts – despite the fact that, as the Court has recognized on numerous occasions (*e.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312, 314, (1976)), the right to marry is a fundamental right, and statutes that interfere with that right are subject to the strictest scrutiny.

The foundation for state regulation of marriage was established in *Maynard* v. *Hill*, 125 U.S. 190, 205 (1888): "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." This insight led Justice Powell, concurring in *Zablocki* v. *Redhail*, 434 U.S. 374, 399 (1978), to acknowledge that "[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."

In other words, even though marriage is a fundamental right, states may impinge upon this right to marry by prohibiting

marriage between certain categories of people based on nothing more than morality concerns alone. Judge Ferren's concurring/dissenting opinion in *Dean* v. *District of Columbia*, 653 A.2d 307 (D.C.App. 1995), makes the point well. Citing as an example the District of Columbia's law against "a man's marrying his son's wife or a woman marrying her stepfather," Judge Ferren (in a section of his opinion joined by the two other members of the D.C. Court of Appeals panel) pinpointed social morality as a self-sufficient basis for consanguinity laws that prohibit marriages among certain relatives even though their unions pose no dangers of biological inbreeding. "The consanguinity provision... reflects taboos – indeed moral judgments about improper marriage relationships – that transcend genetic concerns." 653 A.2d at 313.

The government's interest in promoting marriage laws that reflect and promote social morality is so strong that it even trumps a claim to marriage enhanced by a free exercise claim. Thus, in *Potter* v. *Murray City*, 760 F.2d 1065 (10th Cir.), *cert. denied* 474 U.S. 849 (1985), at issue was the First Amendment free exercise claim of a practitioner of "plural marriage" who challenged Utah's prohibition against polygamy. The Tenth Circuit duly noted that only a compelling state interest could overcome the free exercise claim, 760 F.2d at 1068-69; and that Utah had presented no empirical evidence that "monogamy is superior to polygamy." *Id. at 1069.* The court nonetheless rejected the First Amendment claim: "Monogamy is inextricably woven into the fabric of our society. It is the bedrock upon which

our culture is built. In light of these fundamental values, the State is justified, *by a compelling interest*, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship." *Id.* at 1070 (citation omitted; emphasis added).

What is so compelling about the right of government to legislate in these areas? The answer was well articulated by the English jurist Lord Patrick Devlin. Commenting generally on the role of morality in a society's laws, Devlin emphasized the enormous interests at stake:

> "If men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail if, having based on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society, and mankind, which needs society, must pay its price.
>
> . . . .
>
> "There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."

Devlin, *The Enforcement of Morals* (1965) at 10,13. See generally McConnell, *The Role of Democratic Politics in Transforming Moral Convictions Into Law*, 98 Yale L.J. 1201 (1989); Sandel,

Moral Argument and Liberal Toleration: Abortion and Homosexuality, 77 Calif. L.Rev. 521 (1989).

The position of the Petitioners and some of their supporting amici is that legislatures have no business passing laws regulating consensual sexual conduct and other matters of 'private morality'. But as many jurisprudential scholars have noted, the laws by which a society chooses to govern itself have, among other things, an *educative* function; they establish norms of conduct deemed acceptable by the society. As Justice Stevens noted in his *Bowers* dissent, statutes may have "a purely symbolic role," even if they are not actually enforced. 478 U.S. at 220 n.12 (Stevens, J., dissenting). We urge the Court not to devalue the importance of such symbolism in considering the constitutionality of laws like the one under challenge here.

Petitioners are also off mark in suggesting that the Texas law reflects nothing more than an animus against gay people. It reflects a considered determination by the legislature of Texas that the practice of homosexual sodomy – not the status of homosexual orientation – violates certain broadly held moral values regarding appropriate sexual conduct. Whatever the views of this Court, or public opinion in other states, or in the nation as a whole, as to the morality or immorality of homosexual sodomy, it is simply beyond the role of the judiciary to usurp the legislative role in making law – and making judgments about social morality upon which law is often based.

II.

A DECISION IN FAVOR OF PETITIONERS COULD HAVE FAR-REACHING LEGAL AND SOCIAL CONSEQUENCES

The narrow issue before the Court is whether states may enact laws prohibiting homosexual sodomy. But the broader issue may well be whether states may enact *any* law that reflects and is designed to promote broadly held views of public morality. That is because it will be difficult, if the Court finds the Texas law unconstitutional either on equal protection or on privacy grounds, and especially if the Court devalues the constitutional weight to be accorded the moral underpinnings of the law, to limit the logic of any such ruling to the specific context of homosexual sodomy. This genie, once let out of the bottle, will not easily be restrained.

Consider the argument that the Texas statute violates equal protection by discriminating against homosexuals who engage in sodomy but not heterosexuals who do the same. A similar argument can be – and has been[3] – used to attack marriage laws, which recognize marriage between a man and a woman but do not recognize same-sex unions. A decision by this Court that the Texas statute in question violates the Equal Protection Clause would thus give an enormous legal boost to the attempts now

[3] *See Baehr v. Miike*, 1996 WL 694235, Hawaii Cir.Ct.,1996, aff'd, 950 P.2d 1234 (S.Ct. Hawaii 1997); *Baker v. State*, 744 A.2d 864 (S.Ct. Vt.1999).

being made through the courts in many states to radically revise the longstanding definition of marriage – and invalidate the marriage laws that currently prevail in each of the 50 states – by recognizing same-sex marriages.[4] It is but a very short step from constitutional protection of homosexual activity to constitutional redefinition of marriage.

Or consider the broader implications of Petitioners' privacy arguments. If the Court revisits its earlier holding in *Bowers* and now concludes that homosexual sodomy between consenting adults is a fundamental right akin to the right to contraception and abortion, and/or that the state's morality based

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[4] *Goodridge v. Department of Public Health*, 14 Mass. L. Rptr. 591 (Mass. Super. 2002), is set for oral argument before the Supreme Judicial Court of Massachusetts next month. Other cases are pending in other states. These cases, which center on the argument that equal protection requires that same-sex couples not be denied the status or legal benefits of marriage that are available to opposite-sex couples, appear to be part of a concerted national campaign by homosexual activists to win judicial recognition of same-sex marriage. As the *Detroit News* recently reported,

> In 1993, Hawaii's top court shook the world by seriously considering legally uniting two words rarely heard together before then: "gay" and "marriage." Now, ten years later, the Netherlands and Belgium embrace gay marriage. And this summer Massachusetts' top court could deliver the breakthrough for American gay couples that skittish Hawaiian voters ultimately thwarted.
>
> "We're in another Hawaii moment right now," stresses Evan Wolfson of the Freedom to Marry Collaborative. "Just a decade ago, gay marriage seemed almost unimaginable. Now the question is when, not if." (Deb Price, *Detroit News*, February 10, 2003).

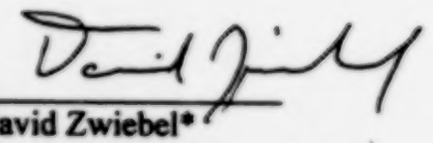
interests are insufficient to justify the Texas law, then it would appear that *any* private sexual activity between consenting adults should by definition be beyond the reach of the law. If a legislature may not impinge upon homosexual activity because it is private and consensual, it will not be long before laws that prohibit prostitution, adultery, bigamy, incest, consanguineous marriages, and other such restrictions on consensual sexual activity come under renewed attack.

To overturn the Texas statute on the grounds that it oversteps the constitutional limits of legislative power would be to invite legal challenges against any if not all such laws whose underpinnings are morality-based. Let those who oppose such laws convince legislative bodies that the moral consensus once thought to underlie the laws no longer exists – much as they have by now convinced the majority of state legislatures in the country to repeal their anti-sodomy statutes. But do not "solve the problem" by judicially depriving those legislatures of the ability to pass legislation in the area of morality generally, and sexual morality specifically, altogether.

CONCLUSION

Justice Harlan once stated: "To attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal." *Poe v. Ullman*, 367 U.S. 497, 545 (1961) (Harlan, J., dissenting). Amicus curiae Agudath Israel of America respectfully urges that this case not be used to withdraw morality-based matters from community concern. The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of February, 2003.



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